TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 397

PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

GEORGE M. DAY, ADMINISTRATOR AD LITEM
OF THE ESTATE OF CHARLES A. DePRIEST.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1958
CERTIORARI GRANTED NOVEMBER 10, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

12462

Civil Action

On Appeal from U.S. District Court for the District of New Jersey

Sat below: Madden, J.D.C.

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest, Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD CO., Defendant-Appellee.

Appendix for Appellant

[fol. 1]

IN UNITED STATES DISTRICT COURT

COMPLAINT

The plaintiff resides at 2985 Atlanta Road, in the City of Camden, County of Camden and State of New Jersey.

1. He is a resident and citizen of the City of Camden, County of Camden and State of New Jersey.

2. The defendant is a corporation organized under the laws of the Commonwealth of Pennsylvania. It is therefore a resident and citizen of the Commonwealth of Pennsylvania.

3. The sum or value of the matters and things in controversy, exclusive of interests and costs, exceeds the sum of $3,000.00.

4. At all times mentioned herein, the defendant was and still is a common carrier of persons and goods in interstate commerce.

5. On or about December 16, 1915, the plaintiff was employed by the defendant as a locomotive fireman and on or about May 13, 1918, he was promoted to a locomotive engineer, in which capacity he continued to be employed until March 10, 1955, at which time he resigned his employment and applied for his annuity. The relationship of employer and employee between the defendant and plaintiff therefore terminated and ceased to exist on March 10, 1955.

6. During the plaintiff's employment as a locomotive engineer and effective March 1, 1941, an agreement in writing was entered into between the Pennsylvania Railroad Company and the Baltimore and Eastern Railroad Company, as employers, with the Brotherhood of Locomotive Engineers, which agreement was for the benefit of all engineers in road and yard service, including the plain-
[fol. 2] tiff herein, employees of the Pennsylvania Railroad Company and the Baltimore and Eastern Railroad Company, and which said agreement contained, among others, Regulations 4-A-1 and 4-O-2, which said regulations read as follows:

"4-A-1. In all classes of service time of engineers, will commence at the time they are required to report for duty, and shall end at the time the engine is placed on designated track or they are relieved at terminal; except that actual time, with a maximum of fifteen minutes, will be allowed engineers in road service for outside inspection and making out necessary reports at end of tour of duty. Such time will be included in total time on duty in calculating overtime, but will not be included in calculating final terminal delay."

"4-O-2. (a) Where regularly assigned to perform service within switching yards, yard engineers shall not be used in road service beyond such switching limits when road engineers are available, except in case of emergency. When yard engineers are used in road service beyond their switching limits under the conditions just referred to, they shall be paid paid miles or hours, whichever is greater, with a minimum of one

hour, for the class of road service performed beyond their switching limits, in addition to their regular day's pay and without any deduction therefrom for the time consumed in said service.

"(b) Engineers assigned to perform a combination yard-belt or yard-transfer service will be paid road rates of pay as provided in Regulation F-A-1 and will not be entitled to compensation under the provisions of paragraph (a) of this regulation (4-O-2) for the transfer or belt line service performed beyond the switching limits of their terminal as covered by their assignment.

[fol. 3] "(c) Yard Engineers used beyond their switching limits to perform belt or transfer service will be paid as provided in paragraph (a) of this regulation (4-O-2) for the time spent beyond their switching limits, but they will not be regarded as having run around any regular or extra road engineers when performing such belt or transfer service."

7. The contract provisions incorporated in Paragraph 6 of this complaint have been construed to mean and were at all times herein understood and intended by the plaintiff and defendant to mean that an engineer regularly assigned to road service who leaves his switching limits and performs a service upon the tracks of a foreign railroad company at a time when no emergency exists and road engineers are available, performs a road service to which he is entitled to one full day's pay for each occasion when he leaves his switching limits and performs such a service. Said contract has further been construed by the defendant to mean that the tracks of a foreign railroad may not be incorporated in the switching limits of the Pennsylvania Railroad Company so as to defeat the compensation provisions hereinbefore referred to.

8. On or about February 1, 1948, the plaintiff herein was regularly assigned to yard service at Old Greenwich, in the City of Philadelphia, County of Philadelphia, Commonwealth of Pennsylvania, said Old Greenwich being a part of Switching District "E" as delineated and pro-

claimed by the Pennsylvania Railroad Company to its employes concerned with such information.

9. Commencing on or about February 1, 1948, while the plaintiff was so assigned to yard service, he was required as a locomotive engineer to leave his switching limits when no emergency existed and when road engineers were available and to perform a service for his employer upon tracks belonging to the Baltimore and Ohio Railroad Com-[fol. 4] pany, known as Tracks Nos. 1 and 2, on the Delaware River Water Front in the City of Philadelphia, where the plaintiff was required to switch and drill cars and trains, although tracks of the Pennsylvania Railroad Company were at hand and available for the purpose.

10. The plaintiff has made claim for his compensation for performing services for his employer upon the tracks of a foreign railroad as required by the rules and regulations of his employer there being between 1000 and 1500 of such occasions, for each of which he is entitled to and claims one full extra day's pay. Said claims were denied by the Road Foreman of Engines, the plaintiff's then immediate superior, by the Division of Superintendant (sic) under whom the plaintiff worked and by the General Manager of the Eastern Region of the Pennsylvania Railroad Company, who is the chief operating officer of the defendant in the region in which the plaintiff was employed. The plaintiff was about to progress his claims to the National Railroad Adjustment Board, Division I, when his retirement occurred and upon the occurring of his retirement, the National Railroad Adjustment Board had no jurisdiction of his said claims but the jurisdiction thereof by reason of the diversity of citizenship hereinbefore pleaded is in this Honorable Court.

Wherefore plaintiff demands of the defendant as damages the sum of $27,000.00 and elects that his retirement shall be a permanent dissolution of the employer-employee relationship existing between him and the Pennsylvania Railroad Company prior to March 10, 1955.

Powell and Davis, Attorneys for Plaintiff, By James M. Davis, Jr., A Member of the Firm.

[fol. 5]

IN UNITED STATES DISTRICT COURT

ANSWER

Defendant, The Pennsylvania Railroad, a corporation organized and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal place of business at Philadelphia, Pennsylvania, answering the complaint of the plaintiff says that:

1. It has no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 1 of the complaint.

2. It admits the allegations of paragraph 2 of the complaint.

3. It has no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 3 of the complaint.

4. It admits the allegations of paragraph 4 of the complaint.

5. It denies all the allegations of paragraph 4 of the complaint, except that it admits that on December 16, 1915 it employed the plaintiff as a locomotive fireman; that he was subsequently assigned to engineman in which capacity he continued from October 1, 1935; that he relinquished all rights to return to service as of March 10, 1955 and has applied for his annuity.

6. It admits the allegations of paragraph 6 of the complaint but respectfully refers to the agreement mentioned therein for the precise terms thereof.

7. It denies the allegations of paragraph 7 of the complaint.

8. It admits the allegations of paragraph 8 of the complaint.

9. It denies the allegations of paragraph 9 of the complaint.

[fol. 6] 10. It denies all the allegations of paragraph 10 of the complaint in general and the following in particular. It denies that the plaintiff's claims or any of them for compension (sic) as alleged in paragraph 10 of the complaint have ever been denied by the General Manager of the Eastern Region of The Pennsylvania Railroad Company. The plaintiff's claim or claims alleged in paragraph 10 of the complaint were not progressed or appealed to the General Manager of the Eastern Region of The Pennsylvania Railroad Company either by the plaintiff or by anyone on his behalf. The defendant further denies that the National Railroad Adjustment Board has no jurisdiction of the plaintiff's said claims and also denies that this Court has jurisdiction of said claims.

First Defense

This Court is without jurisdiction over the subject matter of the claims alleged in the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The cause of action alleged in the complaint did not occur at any time within six years next before the commencement of this action by virtue whereof the statute of limitations constitutes a bar to the maintenance of this action by the plaintiff.

Fourth Defense

1. All tracks involved, the alleged use of which is complained of in the complaint, are within Switching District "E" to which plaintiff was assigned.

[fol. 7] 2. All movements involved on the occasions mentioned by plaintiff in the complaint occurred within Switching District "E".

3. The plaintiff in going on such tracks as alleged on the occasions alleged did not go beyond Switching District "E"; therefore, no rights accrued to plaintiff under Regulation 4-O-2.

4. The plaintiff in going on such tracks as alleged, on the occasions alleged, did not perform any road service.

5. Regulation 4-O-2 has no application to any service performed by plaintiff in going on such tracks as alleged on the occasions alleged; and no rights accrued under regulation 4-O-2 by reason of plaintiff going on said tracks as alleged on the occasions alleged.

Fifth Defense

Plaintiff did not progress, or appeal his alleged wage claims to the General Manager, or monthly System Meeting of General Managers, which steps are a condition required by agreements between The Pennsylvania Railroad and Brotherhood of Locomotive Engineers and required by the Railway Labor Act before resort can be had to the Railroad Labor Board or any other tribunal.

Sixth Defense

After the stated cause of action was alleged to have accrued, the plaintiff received from the defendant and accepted compensation from the defendant for his services in accordance with his employment agreement with the defendant. By reason thereof the plaintiff is estopped from recovering from the defendant any further compensation for his services.

[fol. 8] Seventh Defense

No rights can accrue to the plaintiff under the provisions of the agreement alleged in paragraph 6 of the complaint even if said provisions could be construed as stated by plaintiff in paragraph 7 of the complaint, for then the said provisions are void as against public policy and work a forfeiture, which the Courts will not enforce.

Eighth Defense

This Court is without jurisdiction of the subject matter because:

a. This action involves the construction of a contract between a railroad employer and a labor union, and under the provisions of the Railway Labor Act, the National Railroad Adjustment Board has exclusive jurisdiction of said action.

b. The application by plaintiff for an annuity under the Railroad Retirement Act and his voluntary relinquishment of the right to return to service did not deprive the National Railroad Adjustment Board of its exclusive jurisdiction over the subject matter of this claim for wages for services allegedly performed as a railroad employee, nor confer jurisdiction upon this Court.

Archer, Greiner, Hunter & Read, Attorneys for Defendant; By /s/ F. Morse Archer, Jr., A Member of the Firm.

[fol. 9]

In United States District Court

Notice of Motion to Dismiss

Take notice that on May 17, 1957, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendant, will apply to the United States District Court, District of New Jersey, for an order dismissing the action, because the Court lacks jurisdiction of the subject matter. In support of the motion, the undersigned will rely upon (1) the certified copies of Awards 18115, 18116 and 18117 of the First Division, National Railroad Adjustment Board, denying claims under Regulation 4-O-2, which is the contract provision relied upon by the plaintiff in the instant matter; (2) the opinion by this Court filed herein September 19, 1956, and the Order subsequently entered and filed herein September 28, 1956.

Take further notice that at said time and place the defendant will renew its motion for summary judgment filed

October 6, 1955, the disposition of which was stayed by the above mentioned Order.

Archer, Greiner, Hunter & Read, Attorneys for Defendant, By /s/ F. Morse Archer, Jr., A Member of the Firm, 518 Market Street, Camden 1, New Jersey.

[fol. 10]

ATTACHMENT TO NOTICE OF MOTION TO DISMISS—AWARDS

AWARD 18115

National Railroad Adjustment Board
First Division

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached document with the original on file and of record in my office, and that the attached document is a true and correct copy of the original Form 1 represent Award 18115 in Docket 28988.

/s/ J. M. MacLeod
Executive Secretary, First Division
National Railroad Adjustment Board

State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 22nd day of April, 1957.

/s/ Margaret J. Smith
Notary Public

My commission expires the 12th day of August 1958.

(Seal)

[fol. 11]

National Railroad Adjustment Board
First Division

With Referee Mortimer Stone

Award 18115
Docket 28988

Parties to Dispute
Thomas J. Finlin
The Pennsylvania Railroad Company (Philadelphia Region)

Statement of Claim:

The claim is in behalf of Thomas J. Finlin for an additional day's compensation when regularly assigned yard engine crews were used beyond their switching limits and road crews were available to have performed the service, and no emergency existed.

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was regularly assigned as engineman in yard switching. He claims an extra day at his yard rate for each occasion named on the ground that he left the switching limits of his employer and entered upon the tracks of the Baltimore and Ohio Railroad Company. Claimant

grounds his claim on Regulation 4-O-2 which in pertinent part provides:

> "Where regularly assigned to perform service within switching limits, yard engineers shall not be used in road service beyond such switching limits when road [fol. 12] engineers are available, except in case of emergency."

There is no claim of emergency. Claimant asserts and carrier denies that road crews were available.

Carrier's Philadelphia Terminal Division was divided into six alphabetically labeled switching districts and claimant was assigned to service in Switching District "E". Carrier asserts and claimant denies that all movements involved in this claim occurred within the confines of that district. Carrier further asserts that the tracks of the Baltimore and Ohio Railroad Company, the use of which is the basis of this claim, are part of a joint railroad built by the City of Philadelphia, this carrier, and the Baltimore and Ohio Railroad Company under a "South Philadelphia Improvement Agreement" of March 23, 1914 and amendments, supplemented by city ordinances of Philadelphia; that such tracks, under the provisions of that agreement, were to be operated as a joint railroad and constitute an open gateway to the piers and industries along its line for the traffic of all roads entering the city, and that such joint railroad, including main, passing, and industrial tracks and other facilities should be at all times impartially operated so that all users should be accorded equal facilities. To support those assertions carrier set out in its submission the pertinent paragraphs of said agreement.

While claimant denies that the tracks here involved are part of a joint railroad he does not deny the existence of such joint railroad or of the agreement for its construction and operation but only disclaims knowledge of the agreement and asserts that neither he nor the Brotherhood of Locomotive Engineers were parties thereto.

[fol. 13] Claimant cites no rule of the schedule agreement requiring that any employee or employe organization be

party to such agreements and no other reason is suggested why a carrier may not acquire right for the operation of its trains and the use of its employes over the tracks involved by such agreement as well as by exclusive ownership and control.

Neither in his Statement of Claim nor by statement of facts and supporting data provided for in the Railway Labor Act does claimant define the factual situation on which he bases his "position" that on the occasions listed he "left the switching limits of the railroad company by which he is employed and entered upon the tracks of the Baltimore and Ohio Railroad Company". Consequently the specific theory of his claim is obscure.

If the claim is based on the contention that he was used outside the territorial limits of his assignment, he has shown no facts to support the claim and, in view of carrier's assertion that all movements involved in the claim occurred within the territory of Switching District "E", claimant's simple denial cannot support a sustaining award.

If claim is based on the contention that claimant was used on tracks which were separately owned and operated by the Baltimore and Ohio Railroad Company and so foreign to his assignment even though included within its territorial limits, again no supporting facts were submitted or asserted except by general denial of the paragraph in which carrier asserted that the tracks involved were part of the joint railroad. He has failed to establish such claim.

If claim is based on the contention that even under such joint agreement for building and operating as shown by carrier the tracks to which the Baltimore and Ohio Rail-
[fol. 14] road Company holds legal title are foreign tracks to Pennsylvania Railroad crews and therefore outside their switching limits, claimant has cited no rules apparently supporting such contention. The rules upon which he relies have been in effect in principle since 1921 and there have since been several revisions of the agreement. Claimant does not deny carrier's assertion that before and ever since 1921 yard engineers of the same status of claimant

have daily performed the work in question yet no change has been made or sought in the pertinent rules. Such long practice and acceptance of service on jointly controlled tracks show construction of the agreement on the property as permitting it. Moreover, several awards of this Division in disputes involving similar agreements and schedules have denied similar claims.

Claimant asserts that carrier has compromised claims under similar contracts with other employes but no facts are presented as to such settlements, and even if like situations were involved carrier is not necessarily obligated to allow the present claim. A compromise is not an admission by either party thereto.

Under any theory of the claim before us Regulation 4-O-2 on which claimant relies relates and applies to the use of yard engines in road service. Claimant relies on Award 7986 as interpreting Regulation 4-O-2. The work there involved was road service and the penalty assessed for using yard enginemen in such service was a day's pay at road rate. The work involved in the present claim was yard work, whether or not within the limits of his assignment, and the penalty sought is pay at yard rate. Further, Regulation 4-O-2 limits such road service only when road crews are available. Against carrier's denial claimant asserts that road crews were available; but they could be available only for road work and only on tracks properly used by Pennsylvania crews.

[fol: 15] Regulation 4-O-2 does not apply to a situation such as that before us and does not support the claim.

Award: Claim denied.

National Railroad Adjustment Board
By Order of First Division

Attest: J. M. MacLeod,
Executive Secretary
/s/ J.M.M.

Dated at Chicago, Illinois
This 15th day of March 1957.

[fol. 16]

AWARD 18116

National Railroad Adjustment Board
First Division

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached document with the original on file and of record in my office, and that the attached document is a true and correct copy of the original Form 1 representing Award 18116 in Docket 28989.

/s/ J. M. MacLeod
Executive Secretary, First Division
National Railroad Adjustment Board

State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 22nd day of April, 1957.

/s/ Margaret J. Smith
Notary Public

My commission expires the 12th day of August 1958.

(Seal)

[fol. 17]

National Railroad Adjustment Board
First Division

With Referee Mortimer Stone

Award 18116
Docket 28989

Parties to Dispute
Charles H. Hogentogler
The Pennsylvania Railroad Company (Philadelphia Region)

Statement of Claim:

The claim is in behalf of Charles H. Hogentogler for an additional day's compensation when regularly assigned yard engine crews were used beyond their switching limits and road crews were available to have performed the service, and no emergency existed.

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was regularly assigned as engineman in yard switching. He claims an extra day at his yard rate for each occasion listed on the ground that he left the switching limits of his employer and entered upon the tracks of the Baltimore and Ohio Railroad Company, the Philadelphia Belt Line Railroad Company, and the Reading Company.

Essentially the claim presented here is identical to that in Docket 28988 determined in Award 18115 announced on this date, except that in addition to switching in District [fol. 18] "E" claimant here on occasion served in District "A" where he was used also on tracks, title to which was held by the Reading Company and by the Philadel-

phia Belt Line Railroad Company, claimed by carrier to be within Switching District "A". The latter company was a non-operating company.

As to such tracks, carrier asserts that all movements were over tracks jointly built and equally owned by carrier and the Reading Company, with all tracks accessible to the handling of cars by either in accordance with an ordinance of May 21, 1877 of the City of Philadelphia, the pertinent part of which is set out, and agreements of July 1, 1881 and May 1, 1882 between the predecessors in interest of said companies, except for one track, title to which is held by the Philadelphia Belt Line Railroad Company; that said track was constructed under agreement between carrier and the Reading Company providing that it should be operated in the interest of the parties and under such regulations as should give to each party equal rights with the other and equal dispatch with the other.

Claimant denies the paragraph of carrier's submission concerning the Reading tracks. As to the Philadelphia Belt Line track, he disclaims knowledge of the agreement relied on and asserts that neither he nor the Brotherhood of Locomotive Engineers was a party thereto. We think decision here should be controlled by that on Docket 28988.

Award: Claim denied.

National Railroad Adjustment Board
By Order of First Division

Attest: J. M. MacLeod, /s/ J.M.M.
Executive Secretary

Dated at Chicago, Illinois.

This 15th day of March 1937.

[fol. 19]

AWARD 18117

National Railroad Adjustment Board
First Division

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached document with the original on file and of record in my office, and that the attached document is a true and correct copy of the original Form 1 representing Award 18117 in Docket 28900.

/s/ J. M. MacLeod
Executive Secretary, First Division
National Railroad Adjustment Board

State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 22nd day of April, 1957.

/s/ Margaret J. Smith
Notary Public

My commission expires the 12th day of August 1958.

(Seal)

[fol. 20]

National Railroad Adjustment Board
First Division

With Referee Mortimer Stone

Award 18117
Docket 28990

Parties to Dispute
Darrell L. Middleton
The Pennsylvania Railroad Company (Philadelphia Region)

Statement of Claim:

The claim is in behalf of Darrell L. Middleton for an additional day's compensation when yard engine crews were used beyond their switching limits and road crews were available to have performed the service, and no emergency existed.

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

The situation and claim here presented are substantially identical to those involved in Docket 28989 which resulted in Award 18116. The only apparent distinction is that claimant here was assigned from the extra board while claimant there held a regular assignment.

We think like award should follow.

Award: Claim denied.

National Railroad Adjustment Board
By Order of First Division

Attest: J. M. MacLeod;
Executive Secretary

Dated at Chicago, Illinois.
This 15th day of March 1957.

[fol. 22]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

OPINION

Appearances:

For Plaintiff: Powell & Davis, Esquires, By James M. Davis, Jr., Esquire.

For Defendant: Archer, Greiner, Hunter & Read, Esquires, By F. Morse Archer, Jr., Esquire.

MADDEN, District Judge:

On April 11, 1955, Charles A. DePriest filed a complaint in this court alleging that he had been employed as a locomotive engineer by the defendant, The Pennsylvania Railroad Company, from May 13, 1918 until March 10, 1955, when he retired. He further alleged that on March 1, 1941 the defendant railroad company and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one, which provided, among other things, that if an engineer employed by the defendant operated a train over the trackage of a foreign railroad other than in an emergency, he performed a road service which entitled him to one day's pay in addition to the day's compensation to which he was entitled for services on the road of his employer. DePriest claimed that between February 1, 1948, when he was assigned to yard service, and the time of his retirement, he had performed services on between 1000 and 1500 occasions on the trackage of the Baltimore and Ohio Railroad which entitled him to compensation in the sum of $27,000. He alleged that his claims were denied by the defendant and that due to his retirement, the National Railroad Adjustment Board had no jurisdiction of the matter and [fol. 23] he accordingly was asserting his claims in this action in this court.

The defendant moved to dismiss the action for lack of jurisdiction and in support of its motion filed an affidavit alleging that claims for additional wages under the same agreement had been filed against it before the First Division of the National Railroad Adjustment Board where they were presently awaiting decision. The motion to dismiss was denied with leave to the defendant to request a reasonable stay of the trial of this action pending determination of like issues between other claimants and the defendant then before the National Railroad Adjustment Board. Defendant filed answer and then moved for summary judgment on the ground that administrative remedies had not been exhausted or, in the alternative, sought an order staying all proceedings pending a decision by the National Railroad Adjustment Board interpreting the basic agreement involved in the case.

This court after hearing the motions held, in an opinion filed September 19, 1956, 145 F. Supp. 596, that the action involved the construction of a contract between a railroad employer and a labor union which under the provisions of the Railway Labor Act[1] was exclusively for determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that DePriest, although not a party to the claims pending before the Board, would be a person affected by any order of the Board in the matter, upon which an action could be maintained in the District Court, citing Kirby v. Penna. R. R. Co. (3 Cir. 1951) 188 F. 2d 793. On September 28, 1956 an order was entered by this court in conformity with its opinion retaining jurisdiction of the matter but staying all proceedings until the Board decided the cases presently before it involving [fol. 24] the same provisions of the contract in suit. DePriest appealed this order and pending the appeal DePriest died on February 11, 1957 and his administrator has been substituted as plaintiff.

On April 17, 1957, the Court of Appeals (for this Circuit) through Judge Maris, filed an opinion, 243 F. 2d. 485, holding that the order of September 28, 1956 was not

[1] 45 U. S. C. A. Section 151, et seq.

appealable and the appeal would be dismissed but, likewise, suggesting to this court that upon plaintiff's application it might be well to modify the stay provisions of the order so that all pre-trial preparations might be completed and the matter ready for trial in the event of favorable disposition by the National Railroad Adjustment Board.

Immediately both plaintiff and defendant moved by appropriate motions before the court, the plaintiff for a modification of the stay order, the defendant on a motion to dismiss. The defendant's motion to dismiss was bottomed upon this court's previous opinion in the matter, together with the determination in Awards 18115, 18116 and 18117 of the First Division National Railroad Adjustment Board, which determinations were made March 15, 1957 (after argument before the Court of Appeals in this matter but before determination).

Inasmuch as this court had filed an opinion in another matter involving the question of jurisdiction between the courts and the National Railroad Adjustment Board; Re: Belford Barnett, plaintiff, v. Pennsylvania-Reading Seashore Lines, respondent, 145 F. Supp. 731, and that such matter had, likewise, been appealed to the Court of Appeals, and that argument had been had thereon on April 17, 1957, the court adjourned the matter until disposition of the Barnett matter by the Court of Appeals.

On May 28, 1957, the Court of Appeals, through Judge Goodrich, filed an opinion in the Barnett matter, supra, and these motions were then argued before this court on [fol. 25] June 7, 1957.

An examination of defendant's motion discloses certified copies of the awards in three cases, all claims against the Pennsylvania Railroad Company, in the one, award 18115, Thomas J. Finlin, in the second, award 18116, and in the third, award 18117, all having in issue the interpretation of the very contract and the same factual circumstances involved in the present case, so we are confronted directly with the issue: Under these circumstances, does the National Railroad Adjustment Board have exclusive jurisdiction for the interpretation of the contract?

In its previous opinion in this matter, 145 F. Supp. 596, this court said:

> "If the interpretation of the pending matters on this question by the administrative body is against the claimants thereunder, is it binding upon this Court in the present matter? We think so, under the authority of the Slocum case, supra, and Newman v. Baltimore and Ohio Railroad Co., 3rd Cir. 1951, 191 F. 2d. 560."

If the present status of the law on this subject is the same, this statement would seem dispositive of the matter, at the same time the court is reluctant to take its own statement as sole authority for so holding.

In the DePriest case (Day v. Penn. R. R. Co.) supra, Judge Maris said:

> "* * * On the contrary the stay here was sought merely because of the rule of law laid down by the Supreme Court in Slocum v. Delaware L. & W. R. Co., 1950, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, and Order of Railway Conductors of America v. Southern Railway Co., 1950, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811, that the National Railroad Adjustment Board has exclusive jurisdiction to decide the question raised in this case as to the construction [fol. 26] of the labor agreement here sued on."

And further:

> "* * * Nor can we ignore the fact *that even if the plaintiff's right is established by the board* the amount of the claim at least may well have to be established in the present action in the district court. We, therefore, think it not inappropriate to suggest that the district court, upon plaintiff's application, may well be moved to modify the existing stay of proceedings to the extent necessary to permit the parties to undertake depositions, discovery and other pre-trial procedure in order that the evidence which is now available may be preserved for *use at the trial of the action when and if it takes place.*" (Emphasis supplied)

To this court this at the very least creates an inference that Judge Maris was of a mind that the determination by the National Railroad Adjustment Board if it was against the position of the present plaintiff, was final.

In Barnett v. Pennsylvania-Reading Seashore Lines, supra, Judge Goodrich said:

> "* * * A legislative policy permitting court reexamination of monetary awards but no review in cases where no award is made is not a matter for us to question unless it violates constitutional rights. This statutory scheme does not.
>
> "The view just expressed, that there can be no judicial review when the Board rails to give relief to an employee, is that of other courts which have had occasion to examine the question. Sometimes the conclusion is put on the basis that the statute giving the Board's order finality means what it says. No review is provided for and that is the end of it. [fol. 27] Reynolds v. Denver & R. G. W. R. Co., 174 F. 2d 673 (10th Cir. 1949); Weaver v. Pennsylvania R. R., 141 F. Supp. 214 (S. D. N. Y. 1956); Greenwood v. Atchison, T. & S. F. Ry., 129 F. Supp. 105 (S. D. Cal. 1955); Futhey v. Atchison, T. & S. F. Ry., 96 F. Supp. 864 (N. D. Ill. 1951); and Berryman v. Pullman Co., 48 F. Supp. 542, 543 (W. D. Mo. 1942), where the court said: 'That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts.' Occasionally res judicata is given as the reason. Ramsey v. Chesapeake & O. R. Co., 75 F. Supp. 740 (N. D. Ohio 1948). Other decisions put the result squarely upon the election of remedies theory. Plaintiff having chosen to go to the Board, he cannot now, after losing, come to a court. Majors v. Thompson, 235 F. 2d 449 (5th Cir. 1956); Michel v. Louisville & N. R. Co., 188 F. 2d 224 (5th Cir.), cert. denied, 342 U. S. 862 (1951); cf. Kelly v. Nashville, C. & St. L. Ry., 75 F. Supp. 737 (E. D. Tenn. 1948) (court action brought while proceedings were pending before the Board).

"Regardless of the path taken judicial authority arrives at the same place. The cases which preserve the possibility of court review if the Board has acted unconstitutionally or has gone outside its jurisdiction should be kept in mind. But they are not in point in this case which is a plain challenge to the decision reached by the Board on the merits of the plaintiff's claim."

This view seems also to be the opinion of the Fifth Circuit for in the matter of Sigfred v. Pan American World Airways, 1956, 230 F. 2d 13, Judge Tuttle, speaking of the National Railroad Adjustment Board and the National Air Transport Adjustment Board, said at page 17:

[fol. 28] "In the light of the declared aims of the Act, we also find it to be the intent of Congress to allow the parties to make the awards of such boards final and binding. Therefore, giving normal effect to these words, we refuse to review a challenged ruling of law, there being no question raised regarding the jurisdiction of the board or the regularity of its proceeding.

"However, it was urged upon the district court that the system board's construction of the agreement is arbitrary and capricious. If we regard this as an assertion that the board's arbitrariness rose to the level of a denial of due process, it is not amiss to add that we regard the board's interpretation of the agreement not only entirely reasonable, but we believe it to be the correct interpretation."

And further (page 18):

"The interpretation of such an agreement was held by the Slocum case to be within the exclusive jurisdiction of the statutory board there involved."

It is, therefore, the opinion of this court that the National Railroad Adjustment Board had the contract in question in the present case before it for interpretation in like circumstances; that the present plaintiff did not necessarily have to appear before such Board under the holding

of Kirby v. Pennsylvania R. R., supra; and that the question of interpretation of the labor agreement was exclusively in the National Railroad Adjustment Board and its finding is final and binding upon the plaintiff in this case.

Consequently, the defendant's motion to dismiss will be granted and it, therefore, becomes unnecessary to consider the motion of plaintiff to modify the stay.

Counsel will prepare an appropriate order.

[fol. 29]

IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Filed September 12, 1957

This cause coming on for hearing on defendant, The Pennsylvania Railroad Company's Motion to dismiss the action because the Court lacks jurisdiction over the subject matter of the Complaint, and the Court having heard the argument of counsel and being fully advised and having filed a written opinion herein September 5, 1957, it is

Ordered that the defendant's Motion to dismiss the action be granted because the Court lacks jurisdiction over the subject matter of the Complaint and that the Complaint be and it is hereby dismissed without costs.

/s/ Thomas M. Madden, United States District Court Judge.

Dated: Sept. 12th, 1957.

Approved as to form: Powell & Davis, Esquires, Attorneys for Plaintiff, By /s/ James M. Davis, Jr., A Member of the Firm.

[fol. 30]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

To the Clerk of the United States District Court for the District of New Jersey, and Archer, Greiner, Hunter and Read, Esqs., Attorneys of the Defendant:

Please Take Notice that George M. Day, Administrator ad litem of the Estate of Charles A. DePriest, deceased,

the plaintiff above named, respectfully appeals from the whole of an order entered by this court and in this cause on September 12, 1957, dismissing this action and from the judgment entered thereon dismissing the action, to the United States Court of Appeals for the Third Circuit.

Powell and Davis, Attorneys for Plaintiff, By James M. Davis, Jr., A Member of the Firm.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,462

GEORGE M. DAY, Administrator Ad Litem of the Estate of Charles A. De Priest, Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee.

Appeal from Order of the United States District Court for the District of New Jersey Dismissing Civil Action at No. 356-55.

Appendix for Appellee

[fol. 32]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed May 3, 1955

To: Powell and Davis, Esqs., 110 High Street, Mt. Holly, New Jersey, Attorneys for Plaintiff:

Take notice that on May 20, 1955 at 10:00 in the forenoon, or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendant will apply to the United States District Court, District of New Jersey, Post

Office Building, Camden, New Jersey, for an order dismissing the action, because that Court lacks jurisdiction of the subject matter of said action. In support of the motion, the undersigned will rely upon the following:

(1) This action involves the construction of a contract between a railroad employer and a labor union, and under the provisions of the Railway Labor Act, the National Railroad Adjustment Board has exclusive jurisdiction of said action.

(2) The application by plaintiff for an annuity under the Railroad Retirement Act and his voluntary relinquishment of the right to return to service did not deprive the National Railroad Adjustment Board of its exclusive jurisdiction over the subject matter of this claim for wages for services allegedly performed as a railroad employee.

The affidavit and certified material annexed hereto will be relied upon in support of the motion.

Archer, Greiner, Hunter & Read, Attorneys for Defendant, By /s/ F. Morse Archer, Jr., 1201 Wilson Building, Camden, New Jersey.

[fol. 33]

AFFIDAVIT OF H. D. KRUGGEL IN SUPPORT OF MOTION—
Filed May 3, 1955

Commonwealth of Pennsylvania,
County of Philadelphia, ss.:

I, H. D. Kruggel, being first duly sworn according to law do say that I am Superintendent of the Philadelphia Terminal Division of The Pennsylvania Railroad Company and have immediate charge of the operation of said division.

1. In my official capacity as Superintendent of the Philadelphia Terminal Division of The Pennsylvania Railroad Company I have received from Mr. Charles A. DePriest a letter dated March 11, 1955, advising me that Mr. DePriest had applied for an annuity under the Railroad Retirement Act, and that he relinquished all rights to return to service as of March 11, 1955.

2. Said retirement was purely voluntary on the part of Mr. DePriest and was not required by any rule or requirement of the Pennsylvania Railroad Company.

3. It is also within my knowledge that claims for alleged additional wages due, which are similar to those now being advanced by Mr. DePriest, were filed against this Company by two former Philadelphia Terminal Division engineers by the name of John J. Manning and Charles E. Freehoff. After death of said Manning and Freehoff, their wage claims were progressed by the Administrator and Administratrix, respectively, of their estates, to the First Division [fol. 34] of the National Railroad Adjustment Board. These two claims have been docketed by the said First Division and are now awaiting decision.

H. D. KRUGGEL.

Sworn to and subscribed before me this 2nd day of May, 1955.

HARRY W. REED,
Notary Public.
Philadelphia, Philadelphia County, Penna.

(Seal)

My Commission Expires January 7, 1959.

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division
AWARD 15406

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, and that I have compared the attached document with the original on file and of record in my office, and certify that the attached document is a true and correct copy of the original Award 15406 in Docket 23270.

J. M. MACLEOD
Executive Secretary, First Division
National Railroad Adjustment Board

[fol. 35]
State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 27th day of April, 1955.

MARGARET J. SMITH,
Notary Public.

My Commission Expires the 12th day of August, 1958.

Award 15406
Docket 23270

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago 3, Illinois
Conductors-Trainmen Supplemental Board, with
Referee Mortimer Stone

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS
BROTHERHOOD OF RAILROAD TRAINMEN
NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of G. E. Knight for pay for time lost as Conductor, NO&NE Railroad, during [fol. 36] period May 15, 1944, to March 15, 1946, alleging he was improperly held out of service during this period. (Claimant being sixty-five years of age and having submitted resignation and been granted annuity under Railroad Retirement Act effective March 15, 1946, is not requesting reinstatement to service.)

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe

within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was charged with improper conduct while on duty as conductor on May 8, 1944. He was taken out of service and ordered to report for investigation on May 17th. On that date Superintendent Logan told claimant that he believed the charges against him and urged him to retire since he was over sixty-five years of age. Claimant asked that the investigation proceed at once and Superintendent Logan insisted on postponing action until May 20th to avoid embarrassment to the eighteen year old girl complainant and to give claimant time to consider retirement. On May 19th the Local Chairman delivered to Superintendent Logan request that the appointment for the 20th be postponed with statement that "will possibly give you a date tomorrow". Nothing further was done until June 8 when demand was made of Superintendent Logan for reinstatement of claimant because he was held out of service without investigation within five days. Ten days thereafter the Superintendent replied asking claimant to set a date for investigation and, that not being done, on July 10th he set July 14th as date of investigation. The same date was set for investigation of another charge of misconduct on duty on [fol. 37] May 24th, of which charge claimant had been advised on June 21st. When claimant did not appear neither investigation was attempted and the matters lay dormant until October 30 when both were again set for November 6, and on that date witnesses were examined, without appearance by claimant, and he was found guilty by Superintendent Logan and dismissed from service.

As to the first charge, claimant's guilt had already been determined by Superintendent Logan without hearing and claimant was thereby deprived of his right to a fair and impartial investigation before him.

As to both charges the rule requires investigation within five days if possible. It is the duty of carrier, not the accused, to set the time for investigation and to hold them within five days or as promptly as reasonably possible thereafter. We find here no waiver of prompt hearing and

no proper grounds for the long delay in formal investigations.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: (Signed) J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois, this 12th day of May, 1952.

[fol. 38]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS—Filed June 6, 1955

This matter being opened to the Court by F. Morse Archer, Jr., Esq., of Archer, Greiner, Hunter and Read, Esqs., Attorneys of the Defendant, in the presence of James M. Davis, Jr., Esq., of Powell and Davis, Esqs., Attorneys of the Plaintiff, and the defendant having moved to dismiss the plaintiff's complaint on the ground that this Court lacks jurisdiction in this suit; and the Court having heard and considered the arguments of counsel for both parties and having read and considered the briefs filed in connection therewith; and good cause appearing;

It is, on this 6th day of June, 1955, on motion of James M. Davis, Jr., Esq., one of the attorneys of the plaintiff Ordered that the motion of the defendant to dismiss the complaint filed herein be and the same is hereby denied and an exception is granted to the defendant.

And it is further Ordered that the defendant shall have the right to ask for a reasonable stay of the trial of this cause pending determination of like issues between other claimants and the defendant now pending in the National Railroad Adjustment Board, Division 1, and an exception is hereby granted to the plaintiff.

Thomas M. Madden, J.

[fol. 39]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,462

GEORGE M. DAY, ADMINISTRATOR AD LITEM OF THE ESTATE OF CHARLES A. DEPRIEST, Plaintiff-Appellant,

v.

PENNSYLVANIA RAILROAD CO.

Appeal From the United States District Court
For the District of New Jersey

Argued April 1, 1958

Before KALODNER and HASTIE, Circuit Judges and LAYTON, District Judge.

OPINION OF THE COURT—Filed August 12, 1958

By KALODNER, Circuit Judge:

The substituted plaintiff appeals from an Order entered against him in the District Court dismissing the complaint originally filed by his decedent.

Details of the action, proceedings, and contentions of the parties are set forth in prior opinions of the District Court and this Court[1] as well as in 155 F. Supp. 695, which immediately preceded this appeal.

Briefly stated, Charles A. DePriest commenced this action for damages against the defendant railroad assert- [fol. 40] ing that pursuant to a collective bargaining agreement, and during his employment by the defendant railroad

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[1] DePriest v. Pennsylvania R. Co., 145 F. Supp. 596, appeal dismissed, sub nom. Day v. Pennsylvania R. Co., 243 F.2d 485 (1957).

as a locomotive engineer, he was entitled to compensation greater than that actually paid to him. The complaint recited that DePriest had processed his claim through the defendant's organization, but did not proceed to the National Railroad Adjustment Board because he retired and severed his employment relationship. Although defendant's answer denied that DePriest's claim was administratively rejected by its general manager, it admitted that he was an employee in the period involved and averred that he relinquished all rights to return to service and had applied for his annuity.

Following our dismissal, for want of appellate jurisdiction, of the prior appeal of the decedent, 243 F.2d 485, the plaintiff moved to modify the stay order entered by the District Court. The defendant moved to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter. In support of the motion, defendant attached certified copies of three Awards made by the National Railroad Adjustment Board, First Division, in independent matters, all involving interpretation of the contract here involved with respect to the same issue. These Awards denied relief to the claimants; they were entered by the Board shortly before we rendered our decision on the prior appeal.

The District Court determined that the issue involved was one of interpretation of a collective bargaining agreement; that the question of interpretation was exclusively for the National Railroad Adjustment Board and that its finding was final and binding upon the plaintiff. 155 F. Supp. 695. Although the Opinion of the District Court proceeded upon an inquiry into the binding effect of the aforementioned Awards, which would presuppose jurisdiction, the Order actually entered dismissed the complaint for want of jurisdiction.

[fol. 41] The questions now presented for disposition are whether the cause was within the jurisdiction of the District Court, and, if it was, whether the plaintiff is barred by the Awards submitted in support of defendant's motion.

We are of the opinion that the District Court was not without jurisdiction in the premises and that, at this stage

of the action, it does not appear that the plaintiff is or should be barred from further proceedings.

There is no dispute here that the requirements of an ordinary diversity action are met. If the District Court is deprived of jurisdiction, that must appear from the provisions of the Railway Labor Act, 48 Stat. 1185, c. 691, 45 U.S.C. Section 151, et seq.

The term "employee" is defined in Section 1 Fifth of the Act, 45 U.S.C. Section 151 Fifth, to include "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner or rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . ." Further, Section 3 First(i) of the Act, 45 U.S.C. Section 153 First(i), grants to the National Railroad Adjustment Board jurisdiction to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ."

In this statutory framework, the United States Supreme Court permitted an employee who claimed to have been wrongfully discharged to maintain an action at law without resort to the Adjustment Board even though a question of interpreting a bargaining agreement was presented. Moore v. Illinois Central R. Co., 312 U.S. 630 (1941). The Court there said at page 634:

> "[We] find nothing in that [Railway Labor] Act which purports to take away from the courts the jurisdiction [fol. 42] to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

In Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239 (1950), the railroad, having a dispute with two unions concerning the scope of their respective agreements, commenced an action for declaratory judgment, praying for an interpretation of both agreements. The Supreme Court emphasized the declared purpose of the Railway Labor Act, and noted that settlement of the dispute "would have pro-

spective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties." 339 U.S. at page 242. Accordingly, it held that the jurisdiction conferred upon the Adjustment Board was exclusive, and that the Courts were without power to adjudicate such a dispute.

As to the Moore decision, the Court pointed out:

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we held there, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." 339 U.S. at page 244.

[fol. 43] In the light of these decisions, the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such manner as to affect future relations between the railroad and other employees. For example, see Newman v. Baltimore & Ohio R. Co., 191 F.2d 560 (3rd Cir. 1951); Switchmen's Union of North America v. Ogden Union Ry. & Depot Co., 209 F.2d 419 (10th Cir. 1954), cert. den. 347 U.S. 989; Alabaugh v. Baltimore & Ohio R. Co., 222 F.2d 861 (4th Cir. 1955), cert. den. 350 U.S. 839; Majors v. Thompson, 235 F.2d 449 (5th Cir. 1956).

The Railway Labor Act relates to disputes between employees and carriers. Its broad purposes are set forth in the Slocum decision:

> "The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' . . . This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. . . . The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. . . . The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.
>
> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been [fol. 44] considered a potent cause of friction leading to strikes. It was to prevent such friction that the [May 20] 1926 Act provided for creation of various Adjustment Boards . . . But this voluntary machinery proved unsatisfactory, and in 1934 Congress . . . passed an amendment . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements . . . Precedents established by it [the Adjustment Board] while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." 339 U.S., pages 242-243.

As already indicated, it was precisely along these lines that the Moore case was distinguished.

Here, as in the Moore case, the employer-employee relationship has been terminated; the substantive issue is whether something is owing to the plaintiff. While the court may have to consider a provision of a bargaining agreement, its interpretation would have no binding effect upon future interpretations by the Board, and the future relations between the carrier and its other employees are not involved. Since the claimant in the Moore, or in the instant, situation, is not an employee, there does not exist the unhappy discontent among co-employees because of dissimilar treatment for similar work.

We see no reason to distinguish between this situation and one to recover for wrongful discharge.[2] Cepero v. [fol. 45] Pan American Airways, 195 F.2d 453, 455 (1st Cir. 1952), cert. den. 344 U.S. 840.

We reach, then, the issue discussed by the District Court in its Opinion, that is, whether the plaintiff is bound by the separate awards of the Adjustment Board denying the independent claims of three employees with respect to a similar substantive issue.

The effect of the motion of the defendant in this regard is that of a motion for summary judgment, and upon clearly settled principles such motion may be granted only where no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Rules 12(b) and 56, Federal Rules of Civil Procedure.[3]

In support of its motion, the defendant has attached certified copies of the three Awards upon which it relies.

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[2] In Sigfred v. Pan American World Airways, 230 F.2d 13, 18 (5th Cir. 1956), the plaintiff had submitted his claim to the Adjustment Board, which denied it. The Court held that no reviewable question of law was presented with respect thereto. As to the jurisdiction of the Court, see the dissenting Opinion of Judge Brown, 230 F.2d 19, 22-23.

However, in the case sub judice we are not presented with a similar situation. Rather, we are concerned with the issue, whether the jurisdiction of the Board is exclusive with respect to a controversy not yet submitted to it.

[3] Lawlor v. National Screen Service Corporation, 238 F.2d 59, 65 (3rd Cir. 1956), cert. granted, judgment vacated (on other grounds) 352 U.S. 992 (1957); Sherwin v. Oil City National Bank, 229 F.2d 835, 837 (3rd Cir. 1956); Frederick Hart & Co. v. Recordgraph Corporation, 169 F.2d 580, 581 (3rd Cir. 1948).

But these do not show that the plaintiff or his decedent was a party to any of them, or that either received due notice. Indeed, the recitation in the Awards of the parties to the proceedings does not include the plaintiff or the decedent. It is difficult to see that on such a presentation the defendant should be entitled to summary judgment in its favor. Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945).

The District Court relied upon our decisions in Kirby v. Pennsylvania R.R. Co., 188 F.2d 793 (1951), Barnett v. Pennsylvania-Reading Seashore Lines, 245 F.2d 579 (1957), and the decision on the prior appeal in this case, 243 F.2d 485 (1957). However, the Kirby case involved the right of an employee to take advantage of an Award *against* a carrier where he was able to demonstrate that he was a member of the class for whose benefit the Award was made. The Barnett case involved the finality of an Award in a proceeding to which the employee-plaintiff was [fol. 46] a party. Neither case involved or disposed of the issue presented here. The prior appeal in this case was dismissed because the Order of the District Court, which stayed the action pending disposition of the three proceedings above referred to by the Board, was interlocutory and not appealable. We did suggest, 243 F.2d at page 487, that the District Court might permit discovery and other pretrial proceedings, since "even if the plaintiff's right is established by the Board the amount of the claim at least may well have to be established in the present action in the District Court." This was consistent with the Kirby case but even then merely assumes the plaintiff might bring himself within its operation. Our decision does not hold, and does not suggest, that a negative Award, in a proceeding to which the claimant is not a party and of which he does not receive notice, is binding upon him.

This does not mean that the Board's interpretation of the collective bargaining agreement should be ignored or taken lightly. Justice Rutledge put the matter in useful perspective in Washington Terminal Co. v. Boswell, 124 F.2d 235, 241 (D.C. Cir. 1941), where he said:

> "The whole adjustment procedure up to the point of award, findings and order by the Board, appears

to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have [fol. 47] no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony."

For the reasons stated, the Order of the District Court will be vacated and the cause remanded for further proceedings not inconsistent herewith.

[fol. 48]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12462

GEORGE M. DAY, Administrator ad litem of the Estate of Charles A. DePriest, Appellant,

vs.

PENNSYLVANIA RAILROAD CO.

On Appeal From the United States District Court For the District of New Jersey

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Present: KALODNER and HASTIE, Circuit Judges and LAYTON, District Judge.

JUDGMENT—August 12, 1958

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On onsideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby vacated and the cause remanded for further proceedings not inconsistent with the opinion of this Court, with costs.

[fol. 49] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 50]

IN THE SUPREME COURT OF THE UNITED STATES

No. 397, October Term, 1958

ORDER ALLOWING CERTIORARI—November 10, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.